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No. 109 ~~429 MISC.~~

IN THE

Supreme Court of the United States

JANUARY TERM, 1950

MARTON L. WHELCHEL, *Petitioner,*

v.

A. McDONALD, WARDEN OF THE FEDERAL CORRECTIONAL INSTITUTION AT TEXARKANA, TEXAS,

Respondent.

PETITION FOR WRIT OF CERTIORARI AND SUPPORTING BRIEF

SOUTHWEST PRINTERS—*Law Brief Printing*—Ph. 2-4222, Texarkana

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PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Marton L. Whelchel, respectfully petitions this Honorable Court for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit in this cause, and in support thereof respectfully submits this his petition to which is appended his supporting brief:

PETITION

Summary Statement of the Matter Involved.

Petitioner Marton L. Whelchel was a soldier in the United States Army in a Tank Destroyer Battalion on active war duty under General Patton in the advance across Germany. Before a general court-martial held at Immerath, Germany, on April 10, 1945, petitioner was convicted of rape on a German girl and sentenced to death. It was alleged that the act occurred on March 14, 1945. Petitioner was given the usual and customary examination by a psychiatrist, Captain Segal, before trial, and by the psychiatrist, Captain Segal, was found sane, although the psychiatrist stated that it was a borderline case, and that he also based his conclusion upon the fact that there was no history of hereditary insanity. There was, and was shown on the trial of the case in the District Court, that there was a history of insanity, both in the petitioner's father and grandfather, but this was unknown to Captain Segal.

Petitioner was convicted by the court-martial and given the death penalty. Later the sentence was commuted to life imprisonment by General Eisenhower. Still later, on July 16, 1947, the sentence was reduced to 21 years. On January 10, 1949, petitioner filed his application for discharge under habeas corpus in the District Court of the Eastern District of Texas. After hearing was had,

petitioner was remanded to the custody of the Warden at Texarkana. Petitioner appealed this decision to the Circuit Court of Appeals for the Fifth Circuit. On July 22, 1949, the Court affirmed the judgment of the District Court. On December 28, 1949, the Circuit Court overruled petitioner's motion for rehearing. On February 23, 1950, petitioner forwarded to the Clerk of this Court application to proceed in forma pauperis, and was advised by the Court to submit this petition for Writ of Certiorari along with the application to proceed in forma pauperis, which accordingly is here done.

At the trial before the court-martial, the petitioner was represented by Captain Matisin, who doesn't appear to have been a lawyer. No issue of insanity was made in the trial before the court-martial, but about two weeks after the judgment, Captain Matisin talked to Captain Nino M. Pellettieri, who was surgeon, Medical Corps, 602 Tank Battalion, and who had had frequent contact with Private Whelchel, and was advised by Captain Pellettieri that petitioner might have been irresponsible for his actions. Captain Matisin also made a statement (CMR p. 134)* that from his observation of the conduct of petitioner during his trial that he might have been irresponsible; whereupon, Captain Matisin wrote a petition asking that the case be reopened and that Private

*NOTE.—CMR refers to the court-martial record and HCR refers to the habeas corpus record where used herein.

Whelchel be admitted to a hospital for a thorough neuropsychiatric examination. Captain Matisin attached to his petition a statement of Dr. Pellettieri (CMR 131), a statement of the petitioner's commanding officer, Lieutenant Robert E. Graham (CMR p. 132); also, a statement of Sergeant Harry P. Goolsby (CMR p. 133). In all of these statements it was set out that it appeared that Private Whelchel had had a "crack-up" about February 21, 1945, and that in the opinion of all of them, petitioner was suffering from amnesia at the time of the alleged rape. This petition was presented to the court-martial, and five out of six members of the court-martial concurred that petitioner be given a new neuropsychiatric examination (CMR p. 135). In spite of the recommendation by five members of the court-martial, the reviewing authorities ignored the request and affirmed the sentence.

On trial of the habeas corpus action in the District Court, petitioner presented the deposition of Dr. Pellettieri, now practicing in Chicago, Illinois. Dr. Pellettieri testified that in his opinion, formed from personal examination and also from investigation and statements of persons on the ground, the petitioner was insane both at the time of the occurrence of the rape and at the time of the trial. Dr. Pellettieri was not a specialist as a psychiatrist, but during his practice had had some occasion to engage in the practice of psychiatry. Captain Graham

testified in person that he was Lieutenant and in command of petitioner, and that up to about a month before the alleged occurrence and rape, petitioner had been a model soldier and was in charge of one of the tank destroyers, but they had been in combat in the vanguard of Patton's army for about three months continuously; that about two weeks before the date of the alleged rape, petitioner seemed to "crack up," and related an incident of misbehavior on the part of petitioner, and of which, three days later, petitioner had no recollection whatever. It was Captain Graham's opinion that petitioner was insane both at the time of the alleged occurrence and at the time of his trial. Captain Mafisin's statement was introduced by petitioner, together with the recommendation of the five members of the court-martial. Sergeant Goolsby's statement was introduced in evidence by petitioner, showing that in his opinion petitioner had cracked up before the occurrence and was irresponsible for his actions. Petitioner also introduced two witnesses who knew his father and grandfather. They testified that both father and grandfather of petitioner had had spells of insanity, and during such spells they would do violent acts and afterwards know nothing about them. Petitioner himself testified that he had no recollection of having committed the rape, and no recollection of his trial, but that the first thing he remembered, he was in prison in France.

Respondent introduced no testimony other than the record of court-martial.

Article 87b, Courts-Martial Code, in effect at the time of the trial, was as follows:

> "The reviewing authority will take appropriate action where it appears from the record or otherwise that the accused may have been insane at the time of the commission of the offense, or insane at the time of his trial, regardless of whether any such question was raised at the trial, or of how it was determined if raised."

The trial court held that Article 87b was merely directory, and based his judgment thereon, stating that it was within the discretion of the Commanding General whether or not any further action be taken under Article 87b.

The Circuit Court of Appeals held that the judgment of the trial court concluded the issue of insanity, and that neither the District Court nor the Circuit Court of Appeals could go back of the judgment; that in a habeas corpus proceeding the insanity of the accused could not be gone into, stating that "No issue of mental derangement was made in the trial." (Opinion of the Circuit Court of Appeals, *Whelchel vs. McDonald*, 176 Fed. (2), 312.)

The Circuit Court of Appeals also held, in paragraph three of the opinion, *Whelchel vs. McDonald*, 176 Fed.

(2d) 312, that it may have been the duty of petitioner to have made his application for new trial before the Judge Advocate General in accordance with *Article 53, as amended, 10 U.S.C.A. Sec. 1525;* but this action had begun before that law took effect. However, pending the motion for rehearing in the Circuit Court of Appeals, petitioner did apply to the Judge Advocate General under the terms of said action for rehearing, which was refused by the Judge Advocate General on the 30th day of November, 1949. The Judge Advocate General's Department based their decision on the decision of the Circuit Court in this case, and also held that Article 87b was merely directory.

The Judge Advocate General's Department had theretofore appeared in this case in the trial court and Court of Appeals, filing a brief and arguing the case personally before the Circuit Court; therefore, any judgment rendered by the Judge Advocate General's Department would be a nullity because of already having appeared as counsel for respondent, and being disqualified thereby to hear it.

After the Judge Advocate General's Department had assumed jurisdiction and rendered their opinion, the Circuit Court of Appeals overruled petitioner's application for rehearing, stating that the action of the Judge Advocate General was binding upon the courts of the United States.

Jurisdictional Statement.

The Supreme Court has jurisdiction to review the judgment here in question upon the following grounds:

(a) The Court of Appeals of the Fifth Circuit in this cause has decided an important question of Federal law, which has not been, but should be, settled by the Supreme Court; that is, whether or not an issue of insanity could be raised in a habeas corpus proceeding where there had been no issue of insanity raised in the trial court.

(b) The judgment of the Court of Appeals of the Fifth Circuit in this case on the foregoing point is contrary to, and in conflict with, the judgment of the Ninth Circuit Court in *Forthoffer vs. Swope*, 103 Fed. (2) 707, and the Eighth Circuit Court in *Ashley vs. Pescor*, 147 Fed. (2) 318.

(c) The interpretation placed upon Article 87b by the reviewing authorities was an arbitrary deprivation of the rights of petitioner amounting to a want of due process under the Fifth Amendment of the Constitution of the United States, and in conflict, in principle, with the pronouncement of the Supreme Court in *Johnson vs. Zerbst*, 304 U.S. 458, 58 S. Ct. 1019.

(d) The holding of the Fifth Circuit Court in this case was error and in conflict with a prior ruling of the

same court, *Hiatt vs. Brown*, 175 F. (2) 273, in overruling the petitioner's amended motion for rehearing, wherein petitioner attempted to set up in his amended motion that application had been made to the Judge Advocate General for release under Article of War 53, as amended, 10 U.S.C.A. Section 1525, wherein petitioner, for the first time, had found out that there was no member of the Judge Advocate General's Department a member of the court-martial which tried petitioner originally, though available, and that, therefore, the court-martial was without jurisdiction.

(e) The Court of Appeals was in error in overruling petitioner's motion for rehearing upon the ground that petitioner had applied to the Judge Advocate General for relief under Article of War 53, as amended, 10 U.S.C.A. Section 1525, and which relief had been denied, the Court of Appeals holding that this ruling of the Judge Advocate General was final; in that, the ruling of the Judge Advocate General upon the motion for rehearing was void because the Judge Advocate General had appeared in this cause in the District Court and in the Circuit Court of Appeals, and, therefore, became disqualified to pass upon any application for new trial made by petitioner. Petitioner also claims that this court should hold that Article of War 53, as amended, 10 U.S.C.A. Section 1525, insofar as the same attempts to make the

judgment of the Judge Advocate General, upon such review, final, is void because in conflict with other statutes of the United States and the Constitution, granting the right of habeas corpus.

(f) The Circuit Court of Appeals erred in overruling petitioner's contention that Court-Martial Code, under which he was tried, and the Acts of Congress providing therefor were unconstitutional and void under Article 5 and Article 9 of the Constitution of the United States, in that the said Code and laws provided that an enlisted man must be tried before a court composed solely of officers, upon two grounds:

1. Petitioner, as a citizen of the United States, was entitled to be tried before a court composed at least of one of his peers, under Magna Carta and Article 9 of the Constitution of the United States.

2. The code is unconstitutional because in conflict with Article 5, guaranteeing due process of law to petitioner as a citizen of the United States, and guaranteeing to him a fair trial before a tribunal having no interest in the outcome of the trial, the whole set-up of court-martial being class legislation, excluding enlisted men, and the predominant purpose to enforce discipline to the interest of the officers composing the court-martial, and not to insure that the defendant received a fair and impartial trial under the law.

In our humble opinion, the foregoing specifications of errors are, in the language of Chief Justice Vinson, in his speech before the American Law Institute, within "*The function of the Supreme Court . . . to resolve conflicts of opinion on Federal questions that have arisen among lower courts, pass upon questions of wide import under the Constitution, laws and treaties of the United States.*"

Many cases are pending in Federal courts all over the United States in which the questions raised in this case have been raised, some of the courts holding one way and some another, particularly, on the point of whether or not a person who is tried by a court-martial while insane, the issue not being specifically joined in the trial court-martial, can raise the point in a habeas corpus proceeding; also, the point of whether or not the language of the statute of 87b shall be construed to be mandatory or directory. Again the court will find there are many other cases pending in the United States courts that have raised the question of the unconstitutionality of the statutes governing courts-martial, particularly, the set-up of the court whereby no enlisted man is made a member of the court, especially in view of the fact that Congress had now passed a law remedying that defect. Strange as it may seem, in the more than one hundred years during which this statute has been on the law books, having many times been assumed to have been uncon-sti-

tutional, nobody has ever raised this point against its unconstitutionality that an enlisted man was not allowed representation on the court. The point can be finally settled in this case.

An elaboration of the contentions submitted in the foregoing summary will be argued in petitioner's appended supporting brief.

Therefore, your petitioner prays that his motion to proceed in forma pauperis be granted; that writ of certiorari be issued, directed to the United States Court of Appeals for the Fifth Circuit, commanding the said Court to certify to this Court a full and complete transcript of the record and of the proceedings of the said Court of Appeals had in Cause No. 12,760, on the Docket of said Court, wherein Marton L. Whelchel was Appellant, and A. McDonald, Warden of the Federal Correctional Institution at Texarkana, Texas, was Appellee, to the end that this cause may be reviewed and determined by this Court as provided for by the Statutes of the United States, and the rules of this Court; that on final hearing, the judgment of the Circuit Court of Appeals and the District Court be reversed; and for such other and further orders necessary and proper in the premises as this Honorable Court shall deem to be meet and proper.

Dated this 27th day of February, A.D. 1950.

MARTON L. WHELCHEL, *Petitioner.*

Hugh Carney

HUGH CARNEY, *Counsel for Petitioner.*

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PETITIONER'S SUPPORTING BRIEF ON PETITION FOR WRIT OF CERTIOARI

I.

Opinion of the Court Below.

The opinion of the Court of Appeals for the Fifth Circuit will be found in *Whelchel vs. McDonald,* 176 Federal (2) 312, 178 Federal (2) 760.

II.

Jurisdictional Statement.

The principal point of petitioner's contention is that at the time of his trial by court-martial, he was insane

and had been insane prior thereto and inclusive of the date of the alleged rape; that soon after the trial, Captain Matisin, who was appointed to defend petitioner, discovered, shortly after the trial, that petitioner was insane, and procured written statements from Dr. Pellettieri, Lieutenant Graham, and Sergeant Goolsby, which, together with his own statement, were presented to five members of the court-martial, who concurred in Captain Matisin's request that proceedings be halted and recommended that petitioner be given a thorough psychiatric examination. In Article 87b of the Code for Courts-Martial, it was provided:

> "The reviewing authority will take appropriate action where it appears from the record or otherwise that the accused may have been insane at the time of the commission of the offense or insane at the time of his trial, regardless of whether any such question was raised at the trial, or of how it was determined if raised."

In this case, the Circuit Court of Appeals held, although this provision of the law was not complied with, that the district court under habeas corpus had no power to set it aside, holding that the provision was merely directory; that the plea of not guilty covered the question of sanity at the time of the defense and should have been raised and settled before the trial began. Other Circuit Courts of Appeal have held to the contrary and we invoke the jurisdiction of this court upon said point upon two grounds, to-wit:

(1) The point is of such wide import under the Constitution and laws of the United States as to require this court to pass upon it.

(2) The conflict between the Courts of Circuit Appeals ought to be resolved by this court.

We further say that the Supreme Court has jurisdiction to review the opinion in this case because the error in the judgment of the district court, holding that Article 87b was merely directory, and the point was not specifically passed on by the Circuit Court of Appeals; but the holding of the District Court was evidently approved, as the judgment was affirmed. This holding is error in that the language of Article 87b could not be more mandatory, and the failure of the reviewing authorities to give it effect and carry out its provisions was an arbitrary refusal to give to the defendant the benefit of the law under which he was tried, and, therefore, amounted to a violation of the due process clause of Article 5 of the Constitution of the United States. The Circuit Court of Appeals erred in refusing to consider newly discovered evidence of the fact that petitioner was tried before a court upon which there was no member of the Judge Advocate General's Department as provided for by the Eighth Article of War, Title 10, U.S.C.A. Section 1479, and was contrary and in conflict with a former holding of this same Fifth Circuit Court of Appeals in *Hiatt vs. Brown*, 175 Federal (2) 273.

III.

Statement of the Case.

A full statement of the facts and proceedings in this case will be found in the foregoing petition for certiorari and is here adopted and made a part of this brief.

IV.

Specification of Errors.

Errors specified are as contained and as set forth in the petition heretofore set forth.

V.

Argument.

In the trial of habeas corpus before the district court, there was abundant evidence to show that at the time of petitioner's trial before court-martial, and at time of the alleged rape, petitioner was insane. In fact, there was no contrary testimony except the Government introduced the report of Captain Segal, based upon an examination of petitioner immediately after the alleged rape and some two weeks before the trial. A close analysis of the report of Captain Segal (CMR pp. 73-74) will disclose that Captain Segal himself, though finally determining the petitioner was legally sane, yet, leaves a doubt in the mind of anyone reading his report that he was absolutely convinced of the sanity of petitioner, because his summary was as follows:

> "Throughout the interview with this man one had the impression that here was an individual of borderline normal intelligence who is withholding some information. He must be considered sane and his personality is in keeping with that of a borderline mental defective with psychopathic traits." (CMR p. 74)

In addition to that, in his report Captain Segal says, "There is no family history of mental or nervous disease."

He was wrong, as the trial in the district court showed that petitioner's father and grandfather had both been considered insane. This testimony in the trial court of the insanity of the father and grandfather was uncontradicted. Furthermore, Dr. Pellettieri testified by deposition that in his opinion petitioner was insane both at the time of trial and the time of the commission of the rape. (HCR pp. 11-13, 16-20.) Captain Graham testified that he was insane (HCR p. 34); Sergeant Goolsby said by a statement introduced in evidence that petitioner "appeared to crack up mentally." (HCR p. 24, CMR p. 133.) Captain Matisin, who was appointed to defend petitioner, said in his statement, presented to the court, that there were peculiarities about the conduct of petitioner during the trial which caused him to present evidence to the court that would have warranted a thorough neuropsychiatric examination; and, then, to finally clinch the matter, five members of the court-martial that tried

petitioner, upon the evidence presented by Captain Matisin, concurred in the request that petitioner be given a psychiatric examination. (CMR p. 135.)

It is hard to understand why, in the face of this record and in the face of the language of Article 87b, which, in our opinion, is as mandatory as language could make it, that the reviewing authorities should have ignored this recommendation made by the court, and the evidence presented by Captain Matisin, and refused to order the psychiatric examination, which would have been "appropriate action" demanded by said Section 87b.

Section 63 of the code:

> "The court will inquire into the existing mental condition of the accused whenever at any time while the case is before the court it appears to the court for any reason that such inquiry ought to be made in the interest of justice. Reasons for such action may include anything that would cause a reasonable man to question the accused's mental capacity either to understand the nature of the proceedings or intelligently to conduct or to co-operate in his defense."

This, in our opinion, applies as well to the reviewing authorities as to the court-martial.

The trial court, on the hearing for habeas corpus, disposed of this contention by holding that Article 87b was merely directory. The Circuit Court of Appeals held against petitioner's contention on the ground that the issue was made in the court-martial trial and was one

that was concluded in the court-martial trial, and that it could not be reopened in a habeas corpus proceeding. Both of these contentions are unsound and are directly in conflict with the principles announced by the Supreme Court in *Johnson vs. Zerbst*, 58 S. Ct. Reporter, 302 U.S. 1019. Also see *Burchfield vs. Hiatt*, 86 Federal Supplement p. 18.

How could an insane man make an issue of his own insanity? How could his attorney do so if he did not know about it? His attorney did set it up as soon as he found out about it.

If due process of law means anything, it certainly does mean that the process of trial laid down by the law shall be followed, and that the defendants may have the benefit of the provisions of the law where they are material. Of course, the courts would be justified in saying that some provisions of the law that had not been exactly followed were directory and, thereby, immaterial; but we have not found any case where there was a flagrant refusal to follow the law, as plainly laid down, as was in this case, that the courts have held that the same was not a denial of due process of law. On the contrary, many cases have stated the principles over and over again that there must be an inherent fairness in the administration of justice. *Adamson vs. California*, 67 S. Ct. 1672; *Hicks vs. Hiatt*, 64 F. Supp. 238; *Anthony vs. Hunter*, 71 F.

Supp. 823; *Beets vs. Hunter*, 75 F. Supp. 825; *Hiatt vs. Brown*, 175 F. (2) 273.

Had Captain Matisin been a lawyer, undoubtedly, he would have raised the point of insanity before the court-martial. Had he procured before the court-martial the evidence he did present two weeks after the verdict, there is no doubt but what the court-martial itself would have stopped proceedings and had a thorough psychiatric examination made of prisoner at that time. This is shown by the recommendation of the five members of the court, and that is what should have been done by the reviewing authorities. The fact that the reviewing authorities did not do this cannot be explained in any other way except as an arbitrary refusal to give petitioner the benefit of the law in his favor, thus depriving him of his rights of due process under the Fifth Amendment of the Constitution.

All these facts were shown in the trial on the habeas corpus action before the district court, and, in addition to the facts shown to the reviewing authorities, it was further shown on trial in the district court that there was insanity in the family of petitioner (HCR pp. 46-48). The district court was of the opinion that this testimony was immaterial (HCR p. 45), but we can conceive of no testimony that would have been more material, because it is common knowledge that hereditary influence is the greatest possible proof of insanity, and had Captain Segal

known that both the father and grandfather of this boy had been considered insane and had committed insane acts, there is no doubt that Captain Segal himself would have declared this man was insane because as he says, without this testimony, it was a "border-line case."

We desire to consider the point in the opinion of the Circuit Court of Appeals that, because of the fact that pending a motion for rehearing in the Circuit Court of Appeals, petitioner made his application to the Judge Advocate General for rehearing as provided by Article of War 53, as amended, 10 U.S.C.A. Section 1525, and his application was denied, the Circuit Court holding that by this denial there was a finality beyond which the courts could not go.

This, we say, is error for many reasons. In the first place, it was a futile gesture for the petitioner to appeal to the Judge Advocate General's Department while the same department was at that time appearing in the Circuit Court of Appeals with their brief and written argument, contending that petitioner's action had no basis in law or equity. Certainly the counsel for your opponent cannot be held to be qualified to pass on the merits of your lawsuit, so that the Judge Advocate General should have disqualified himself in passing on this motion, and his failure so to do, being interested on the opposite side of the case, makes his action a nullity.

In the second place, it is our considered opinion that the Act of February, 1949, under Article of War 53, as amended, 10 U.S.C.A. Section 1525, was not intended to close the door forever to one who had been deprived of his constitutional rights. If it was so intended, it was unconstitutional, because Article I, Section 9, of the Constitution specifically gives to the courts the power to review by habeas corpus any person wrongfully imprisoned. This power is greatly elaborated by statute, *Title 28, Sections 451-466;* also, by the decisions of the Supreme Court, *Johnson vs. Zerbst*, supra.

Of late this court has put life into the Constitution and statutes providing for writs of habeas corpus, and as said by Mr. Justice Black in the *Johnson vs. Zerbst* case:

> "These principles, however, must be construed and applied so as to preserve—not destroy—constitutional safeguards of human life and liberty. The scope of inquiry in habeas corpus proceedings has been broadened—not narrowed—since the adoption of the Sixth Amendment . . . and the court upon determining the actual facts is to 'dispose of the party as law and justice require.'"

So that if it was the intent of this article, providing for new trials before the Judge Advocate General, to foreclose the right of a court of justice to look into the case and see whether or not justice had been done to a citizen of the United States, then that law is unconstitutional

and void because in contravention of Article 1, Section 9, of the Constitution.

In the third place, this case comes within those exceptional circumstances where the need afforded by a writ of habeas corpus in appeal as set forth in *Boiceu vs. Johnston*, 306 U.S. 19, and as fully discussed in the recent case of *Sinclair vs. Hiatt*, 86 F. Supp. 828, in the United States District Court for the Northern District of Georgia, E. Marvin Underwood, Judge. This Sinclair case was decided November 1, 1949, and contained a review of the decision of the Circuit Court of Appeals in this case; therefore, we think that, if valid, the statute of February 1, 1949, providing for motion for rehearing before the Judge Advocate General may not in some cases be final. We think that the principle announced in *Price vs. Johnston*, 334 U.S. 266, would apply to this particular case, which was stated by the court as follows:

> "Moreover, the principle has developed that the writ of habeas corpus should be left sufficiently elastic so that a court may, in the exercise of its proper jurisdiction, deal effectively with any and all forms of illegal restraint. The rigidity which is appropriate to ordinary jurisdictional doctrines has not been applied to this writ."

Finally, we urge the court to pass upon the contention we made in the application for writ of habeas corpus: that the laws providing for court-martial, and the code thereunder, are unconstitutional and void because the law

is in conflict with Article 5 of the Constitution of the United States, guaranteeing due process of law, and Article 9 of the Constitution of the United States, guaranteeing to the citizens of the United States all the rights theretofore enjoyed by citizens, whether enumerated in the Bill of Rights or not. We think under this provision of Article 9 of the Constitution, it was contemplated that never should a citizen be tried by a court from which his peers had been precluded. This right had been enjoyed by English speaking people since Magna Carta. It is true that Article 5 specifically exempts jury trials in time of war, but there is nothing in the exemption of military trials to exclude representation on the court by an enlisted man. So great has been the feeling that this probably was unconstitutional, and certainly wrong, that Congress has now passed a law providing for the inclusion of enlisted men on a court-martial.

Of course, it may be said that we are a little late in coming before this court with the plea that the court-martial laws are unconstitutional, because they have been held to be for more than one hundred years, constitutional. But, we do say that in no case in the one hundred years do we find where the Supreme Court of the United States has specifically held that a court-martial constituted by officers alone, and excluding therefrom enlisted men, would be a constitutional court in the trial of such enlisted men.

The whole set-up of the court-martial—the General appoints the court—officers; the General appoints the prosecuting attorney—an officer; the General appoints the defense counsel—an officer; the General reviews the decision of the court—is such discrimination against an enlisted man as to be a want of due process; it appearing that the whole set-up is more for the interest of the officers to maintain discipline than to secure the rights of those tried. Since the investigation made by Congress a few years ago, and from which emerged a new act providing for representation on the court for enlisted men, the conscience of people and of the lawmakers has been awakened to the gross injustice of the procedure heretofore prohibiting enlisted men from being members of the court. This investigation disclosed gross abuses growing out of the powers granted by the court to the officers only.

In the next place, we say the law is unconstitutional in that the judges composing the court are interested in the outcome. The interest of the judges (officers) is to maintain discipline. In the case of *Dugan vs. State of Ohio*, 48 S. Ct. Reporter 272, U.S. 439, this court held that because of the small pittance of a two-dollar fee to the judge upon conviction, a trial in that court was not due process of law. How much more is the interest of the officers to maintain discipline, even though it cannot be measured in money. It still is an interest that would

preclude the officer court from giving to an enlisted man his rights under the law, but would rather tend to make those courts mere instruments through which discipline might be rigidly maintained.

An interesting discussion of these matters will be found in an article appearing in the *American Bar Association Journal* for January, 1949, by the Honorable George A. Spiegelbery of the New York Bar on pages 29-31. Also, in the case of *Beets vs. Hunter*, 75 F. Supp. 825, the language of Circuit Judge Murrah expresses our feeling that this law could not but create a court, a trial before which was not due process of law:

> "The trial of this case in the eyes of both the prosecution and the defense was wholly obnoxious and repulsive to their fundamental sense of justice, and that is the test by which this Court should judge it. The Court has no difficulty in finding that the court which tried this man was saturated with tyranny; the compliance with the Articles of War and with military justice was an empty and farcical compliance only, and the Court so finds from the facts and so holds as a matter of law. He could not have received due process of law in a trial in a court before men whose judgments did not belong to them, who had not the will nor the power to pass freely upon the guilt or innocence of this petitioner's offense, the offense for which he was charged. It cannot stand the test of fundamental justice. It may have been prompted by the exigencies of war, but it can't stand in the light of cold reason and justice as we love it and for which this petitioner was fighting when he was arrested."

We also quote from Mr. Justice Roberts in *Lisenba vs. California*, 314 U.S. 219, 62 S. Ct. 280, 86 L. Ed. 166, wherein he said:

> "As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice."

Also, we quote from *Adamson vs. People of California*, 67 S. Ct. 1672, wherein Mr. Justice Frankfurter says, as follows:

> "The relevant question is whether the criminal proceedings which resulted in conviction deprived the accused of the due process of law to which the United States Constitution entitled him. Judicial review of that guaranty of the Fourteenth Amendment inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses. These standards of justice are not authoritatively formulated anywhere as though they were prescriptions in a pharmacopoeia."

Judged by these standards, the petitioner in this case has not had accorded to him the due process of law required by Article 5 of the Constitution of the United States.

VI.

Conclusion.

We, therefore, respectfully submit that this case is one calling for the exercise by this court of its supervisory power to grant a writ of certiorari and, upon final hearing, to reverse the decision of the court of appeals and the district court in this case.

Respectfully submitted,

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